RIGHTS STUFF

A Publication of The City of Bloomington Human Rights Commission

City of Bloomington

May 2011

Volume 141

Social Network Site Information Discoverable In Harassment Lawsuit

The U.S. Equal Employment Opportunity Commission sued Simply Storage on behalf of two women, alleging the company was liable for sexual harassment by one of its supervisors.

As part of the discovery process before the trial, Simply Storage requested all photographs or videos posted by either of the women or on their behalf on Facebook or Myspace. They also asked for the women's complete Facebook profiles, including updates and changes, and all status updates, messages, wall comments, causes joined, groups joined, activity streams, blog entries, blurbs, comments, and applications (including, but not limited to, "How well do you know me" and the "Naughty Application").

The EEOC objected, saying the requests were overbroad, not relevant, unduly burdensome and an invasion of privacy. The agency argued that the production should be limited to content that directly addresses or comments on matters alleged in the sexual harassment complaints. The Court largely ruled in Simply Storage's favor.

The Court said that the information on a social network site is not "private" just because the member locks it from public access. It may be private in a sense, but it still may be discoverable as part of litigation. The Court said that "[i]t is reasonable to expect severe emotional or mental injury [such as that alleged to be caused by the sexual harassment in this case] to manifest itself in some SNS (social network site) content." Furthermore, the Court said, "information that evidences other stressors that could have produced the alleged emotional distress is also relevant."

The Court held that Simply Storage was entitled to see "any profiles, postings, or messages (including status updates, wall comments, causes joined, groups joined, activity streams, blog entries and SNS applications" for the claimants "that reveal, refer or relate to any emotion, feeling or mental state, as well as communications that reveal, refer, or relate to events that could reasonably be expected to produce a significant emotion, feeling, or mental state." The claimants have to produce any photos of them taken and posted during the relevant time period "because the context of the picture and the claimant's appearance may reveal the claimant's emotional or mental status."

(Continued on page 4)

BHRC
PO BOX 100
Bloomington IN
47402
349-3429
human.rights@
bloomington.in.gov

Healing Pilgrimage Not Protected By FMLA

Maria Tayag began working for Lahey Clinic Hospital, Inc., in 2002 as a health management clerk. She received good reviews for her work.

Beginning in 2003, Mrs. Tayag repeatedly requested FMLA leave to care for her husband, Rhomeo Tayag, who suffers from gout, chronic liver and heart disease, rheumatoid arthritis and kidney problems severe enough to require a kidney transplant. Lahey repeatedly granted these requests. In May 2006, she used vacation time to travel with Mr. Tayag to Lourdes, France, a site for reputed miraculous healings. She did not request FMLA coverage for this trip.

In June 2006, she requested a vacation from August 7 to September 22, 2006. Her supervisor told her such an extended vacation would leave the department with inadequate coverage. But because Mrs. Tayag had mentioned that her husband would be needing medical care, the supervisor gave her FMLA paperwork to complete. In July, Mrs. Tayag requested FMLA benefits to assist Mr. Tayag while he traveled. She did not tell Lahey that the travel was for a spiritual pilgrimage to the Philippines. She also did not give Lahey any contact information to use during her trip.

In July, Mr. Tayag had surgery. At the time, Lahey requested new FMLA certification from his doctors. His primary care physician wrote that his diseases "significantly affect his functional capacity to do activities of daily living" and recommended that Mrs. Tayag receive medical leave "to accompany [her husband] on any trips as he needs physical assistance on a regular basis." His cardiologist wrote that Mr. Tayag was "presently . . . not incapacitated" and that Mrs. Tayag would not need to take a leave. Given the difference of medical opinion, Lahey wrote Mrs. Tayag twice in early August, telling her that her leave request was unapproved. They also left messages on her home telephone. Because she was out of the country at the time, she didn't receive these inquiries and thus didn't respond. Since Lahey didn't get a response by its deadline, it terminated her employment in a letter sent to her home on August 18.

While the Tayags were in the Philippines in August and September 2006, they went to Mass, prayed, spoke with priests and pilgrims at the Pilgrimage of Healing Ministry, visited other churches and visited friends and family. Mr. Tayag received no conventional medical treatment and saw no doctors while on the trip. Mrs. Tayag assisted him by administering medications, helping him walk, carrying his luggage and being present in case his illness got worse.

In April 2008, Mrs. Tayag sued Lahey for violating the Family and Medical Leave Act. The District Court ruled that the Philippines trip was "effectively a vacation" not covered by the FMLA. She appealed and lost again.

The Court of Appeals noted tht the FMLA covers leaves for "planned medical treatment." Mrs. Tayag described the Philippine trip as a "series of 'healing pilgrimages' with incidental socializing." The Court said that such a trip does not meet the definition of "medical care" under the law. It addresses faith healing only in the regulations identifying others as capable of providing health care services, including Christian Science practitioners, subject to certain conditions.

Mrs. Tayag said that on constitutional grounds, the FMLA should not cover Christian Science practitioners but exclude Catholics. She argued that "both religiously affiliated healing programs are aimed at treating the illness and providing psychological comfort." The Court did not agree. The Christian Science exception applies to people whose religion forbids ordinary medical care. Mr. Tayag had availed himself to a variety of ordinary medical care; clearly his religion did not forbid it.

The case is Tayag v. Lahey Clinic Hospital, Inc., 632 F. 3d 788 (1st Cir. 2011). ♦

Do Mandatory Health Risk Assessments Violate The ADA?

An unnamed county asked the Equal Employment Opportunity Commission for guidance on the following question: does it violate the Americans with Disabilities Act (ADA) to require employees to participate in a clinical health risk assessment? The County required its employees to participate in the assessment as a condition to obtain health insurance coverage. Employees had to answer a short health-related questionnaire, take a blood pressure test and provide blood for use in a blood panel screen. If they refused, neither they nor their families would be eligible for the County's health insurance. The specific information from the assessment went only to the employee; the County received health information only in the aggregate.

The EEOC, in a nonbinding letter that does not have the force of a court decision, but which would likely be given consideration in a court case, said that such a practice violates the ADA. The EEOC letter, published in March of 2009, said that under the ADA, employers may make disability-related inquiries only if they are job-related and may require medical examinations only if they are job-related and consistent with business necessity. The EEOC said that "requiring that all employees take a health risk assessment that includes obtaining health insurance coverage does not appear to be job-related and consistent with business necessity, and therefore would violate the ADA." Employers may make disability-related inquiries only when they have a reasonable belief, based on objective evidence, that an employee's ability to perform essential job functions will be impaired by a medical condition, that an employee might pose a direct threat due to a medical condition, or when an employee is requesting a reasonable accommodation and the need for the accommodation is not obvious. None of these provisions apply to the health assessment scenario.

The EEOC noted that the ADA does permit disability-related inquiries and medical exams as part of voluntary wellness programs. A wellness program is considered to be "voluntary" if employees are not required to participate and if they are not penalized if they don't participate. Refusing health insurance to employees who decline to participate makes the County's proposed program involuntary. ♦

Court Of Appeals Holds That Woman Should Be Able To Insure Her Wife

Karen Golinski works for the federal judiciary. She is married to a woman and sought to add her wife to her employer-provided health insurance. When this was not allowed, she sued. The Court of Appeals found that the denial violated the constitutional guarantee of equal protection and ordered the administrative office of the United States Courts to submit her insurance form adding her wife to her plan. The Administrative Office did so, but the Office of Personnel Management (OPM) directed the insurance carrier not to process Ms. Golinski's form. Ms. Golinski again appealed.

The Court of Appeals dismissed OPM's argument that its interpretation of judicial employees' rights and benefits could overrule its own, saying this argument was "incorrect, and the Executive must henceforth respect the Judiciary's interpretation of the laws applicable to judicial employees." The Court awarded Ms. Golinski back pay for her lost benefits, ordered the Administrative Office to resubmit her insurance form, ordered OPM to "cease at once its interference with the jurisdiction of this tribunal" and ordered the insurance company to enroll Ms. Golinski's wife in its insurance plan within 30 days of receiving the forms.

This precedent does not apply to private employers, as equal protection guarantees do not apply to private entities.

The case is In the Matter of Karen Golinski, 587 F. 3d 956 (9th Cir. 2009). ♦

News From The EEOC

The U.S. Equal Employment Opportunity Commission announced in November that it had reached a settlement with Marlow 6 Theater in Maryland. According to the EEOC, Marlow 6 fired a concession manager when the theater learned she was HIV positive. The theater agreed to pay $20,000 to provide training to all of its employees on the Americans with Disabilities Act and to be monitored by the EEOC for five years.

The agency announced in December that it had reached a settlement of $1.62 million with Akal on behalf of 26 female security guards. Akal provided contract security guard to U.S. Army bases. According to the EEOC, Akal fired security guards who became pregnant, subjected female employees to less favorable terms and conditions and retaliated against an employee who had complained about the discrimination by filing baseless criminal charges against her.

And the EEOC recently announced that it had dramatically slowed the growth of its "private sector charge inventory." It said at the end of fiscal year 2010, it had 86,338 pending charges, an increase of less than one percent from the previous year. Between fiscal years 2008 and 2009, the pending inventory increased almost 16%. In fiscal year 2010, the agency's mediation program resolved 9,370 complaints, a record. The EEOC said that it has "begun to replenish its depleted ranks and dedicate significant resources to training employees."

EEOC Sues Law Firm For Age Discrimination

The U.S. Equal Employment Opportunity Commission has sued Kelley Drye & Warrne, an international law firm based in New York City, for age discrimination in employment.

According to the lawsuit, the law firm dramatically reduced the pay for attorneys who were 70 or older compared to younger attorneys with similar productivity. When Eugene D'Ablemont, an attorney with the firm for more than 40 years, complained about the age-based compensation, the EEOC said the firm reduced his bonus payment by more than two-thirds.

Elizabeth Grossman, regional attorney in the EEOC's New York office, said, "A law firm's compensation for its attorneys should be based on ability and productivity, not on age-based stereotypes about declining effectiveness." The director of the EEOC New York office, Spencer H. Lewis, Jr., added, "More and more attorneys are effectively practicing law into their 70s and beyond. This is also seen by the fact that most current Justices on the U.S. Supreme Court are over 70 years old."

In fiscal year 2009, the EEOC received 22,778 complaints alleging discrimination in employment on the basis of age. This was the second highest level ever. ♦

Social Network Site Discoverable

(continued from page 1)

The Court dismissed the privacy concerns, saying that since the claimants posted the information and let someone see it, even if the access was limited, it was not truly private. The Court quoted another judge who wrote, "Facebook is not used as a means by which account holders carry on monologues with themselves."

The case is Equal Employment Opportunity Commission v. Simply Storage Management, LLC and O.B. Management Services, 270 F.R.D. 430 (S.D. Indiana 2010). ♦

DON'T FORGET TO VOTE ON MAY 3!!